

## Science and Technology Law Review

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Volume 19 | Number 2

Article 3

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2016

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Ekaterina G. Long

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### Recommended Citation

Ekaterina G. Long, *The Law of Intangible Assets: The Philosophical Underpinnings of Trade Secret Law in the United States*, 19 SMU SCI. & TECH. L. REV. 125 (2016)  
<https://scholar.smu.edu/scitech/vol19/iss2/3>

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# The Law of Intangible Assets: The Philosophical Underpinnings of Trade Secret Law in the United States

Ekaterina G. Long\*

## I. INTRODUCTION

Secret business information merits strong legal protection. Secret business information is not only a *sine qua non* of the market economy, but it is also intangible, and therefore vulnerable by nature.<sup>1</sup> The law of trade secrets protects this valuable information.<sup>2</sup> Trade secret law, with its bifurcated jurisprudential roots in relational duties and property rights,<sup>3</sup> also draws upon the legally-entrenched principles of tort and contract.<sup>4</sup> The law of trade secrets is integral to the market economy. It helps enforce fair competition between businesses, stimulate innovation, and boost economic development.<sup>5</sup> Broadly speaking, trade secret law protects information developed and used by various business entities to supply a distinct product or service to the public.<sup>6</sup> As such, businesses would have little incentive to invent new products or services. Without the protection of trade secret law,<sup>7</sup> market competitors would likely capitalize on the secret information by obtaining it through improper means and use it to deliver the same or improved products or services at a lesser cost.<sup>8</sup> This unethical behavior would naturally lead to unfair results. While one company invests hefty amounts of money into its research and development to produce valuable products or services, another may siphon

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\* Associate, Cooper & Scully, P.C., Dallas, Texas. B.A., The University of Dallas, Phi Beta Kappa; J.D., SMU Dedman School of Law. For sparking my curiosity in the topic of trade secret law, I thank Reese Gordon Marketos LLP. For helpful comments on the topic of trade secret law, I thank Professor W. Keith Robinson, Professor Charles M. Hosch, Monica W. Latin, Chris Schwegmann, Benton Williams, Ross A. Williams, and Jesse A. Okiror. All errors are my own.

1. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 987 (1984).
2. See Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 13 (2007) (citing Peabody v. Norfolk, 98 Mass. 452, 458 (1868)).
3. Charles Tait Graves, *Trade Secrets as Property: Theory and Consequences*, 15 J. INTELL. PROP. L. 39, 41 (2007).
4. *Id.* at 42.
5. 1 MELVIN F. JAGER, TRADE SECRETS LAW § 1:4: THE ENCOURAGEMENT OF RESEARCH AND INNOVATION (2016 ed.).
6. See Risch, *supra* note 2, at 7–8; see also Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69, 70 (1999).
7. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW, 294 (2003).
8. See, e.g., *id.*

off its secret information without the equivalent development and production costs.<sup>9</sup>

Two key points merit further consideration. First, information is intangible by nature, thus raising a concern about the justification for its legal protection.<sup>10</sup> Second is the need to determine the extent of that protection.<sup>11</sup> These two points are interrelated. The stronger the justification for legal protection, the stronger the protection should be.<sup>12</sup> The intangible nature of information renders it amorphous and vulnerable to misappropriation.<sup>13</sup> These qualities necessitate its strong legal protection.<sup>14</sup> This protection chiefly rests on the theoretical underpinnings of natural law jurisprudence, originally recognized and utilized by American courts in adjudicating trade secret as property.<sup>15</sup> To be clear, “property” refers to the term as it was originally conceived by the seventeenth century British philosopher John Locke.<sup>16</sup>

## II. TRADE SECRET LAW IN THE UNITED STATES: ITS EVOLUTION AND IMPORTANCE

### A. The Evolution of Trade Secret Law

#### 1. Definition of a Trade Secret

Until 1979, American courts relied on the Restatement of Torts to adjudicate trade secret misappropriation cases. Under the Restatement, a trade secret is defined as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of

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9. *Id.*

10. *See id.* at 310.

11. *See id.* at 311.

12. *See* Chiappetta, *supra* note 6, at 72 (“Whether we treat trade secret law as creating a duty of confidence, as contract, as protecting property rights, quasi or full-fledged, or as a separate doctrine founded on its own justifications, will profoundly affect the outcome.”).

13. *See id.* at 73 (distinguishing two categories of trade secret misappropriation: (1) “breach of duty”; and (2) “bad acts”).

14. *See id.* at 165 n.113 (“Unlike physical goods or land which can only be possessed by one person or group at a time, ideas can be possessed and used by numerous people simultaneously.”).

15. *See, e.g.,* Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2022 (2009).

16. *See, e.g., id.* at 2020–22.

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manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.<sup>17</sup>

However, in 1979, the enactment of the Uniform Trade Secrets Act (UTSA) altered the definition of trade secret. For the most part, the enactment of the UTSA was meant to solve the lack of uniformity and predictability under the Restatement's definition in adjudication of trade secret cases.<sup>18</sup> Forty-eight states have thus far adopted some form of the UTSA,<sup>19</sup> which defines a trade secret as follows:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>20</sup>

The UTSA's definition is more favorable to trade secret owners than the Restatement's in at least two respects. First, the UTSA protects information of economic value, so long as its owner takes reasonable steps to ensure that the information remains secret.<sup>21</sup> Second, the UTSA protects secret business information that the owner possesses, despite whether it is used in developing a given product or service.<sup>22</sup> Both of the definitions, however, underscore the notion that the protection of trade secret law only extends to information that is, in fact, secret.<sup>23</sup>

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17. RESTATEMENT OF TORTS § 757 cmt. b (1939).

18. Sarah Gettings, *Burbank Grease Services, LLC v. Sokolowski: Frustrating Uniformity in Trade Secret Law*, 22 BERKELEY TECH. L. J. 423, 428–29 (2007).

19. See EDWARD H. PAPPAS & DANIEL D. QUICK, *TRADE SECRETS: PROTECTION AND REMEDIES*, 43–3rd C.P.S., Worksheet 2 Applying the Uniform Trade Secret Act (BNA 2012) (Massachusetts and New York continue to apply common law in trade secret cases).

20. UNIF. TRADE SECRETS ACT § 1(4) (1985). In 1995, the Restatement (Third) of Unfair Competition introduced a third definition of trade secrets. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (“A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”). However, this definition never reached the level of popularity of the other two definitions, and this paper will not discuss it.

21. UNIF. TRADE SECRETS ACT § 1 cmt. at 6–7 (1985).

22. *Id.*

23. See UNIF. TRADE SECRETS ACT § 1(4) (1985); see also RESTATEMENT OF TORTS § 757 cmt. b (1939).

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## 2. Trade Secret Infringement Claims, Bodies of Law Protecting Trade Secrets, and Remedies

Several causes of action are available to impose liability for unauthorized use or disclosure of a trade secret.<sup>24</sup> In civil actions, plaintiffs ordinarily rely on tort or contract law.<sup>25</sup> For example, plaintiffs can claim breach of an express contract such as a nondisclosure or a non-competition agreement.<sup>26</sup> If plaintiffs successfully establish a breach of contract, they may recover the loss of the trade secret's value and consequential damages, reduced by any benefit the trade secret owner received from the breach.<sup>27</sup> Absent express contractual agreements, some jurisdictions may still find trade secret misappropriation from breach of contracts implied in fact or in law.<sup>28</sup> To find misappropriation based upon breach of a contract implied in law, courts look for a reasonable inference of preexisting confidential relationships.<sup>29</sup> The requirement of such relationships to impose liability is a fundamental weakness of contractual remedies. Contract law is powerless to protect trade secret holders from misappropriations by third parties because, by definition, no confidential relationship or privity exists.<sup>30</sup> Under such circumstances, plaintiffs may nonetheless assert misappropriation by relying on the UTSA or its equivalent under state law.<sup>31</sup> In jurisdictions without a UTSA equivalent, plaintiffs may assert the common law tort of misappropriation.<sup>32</sup> Under both common law and the UTSA, equitable remedies such as preliminary and permanent injunctions,<sup>33</sup> and remedies at law such as compensatory and punitive damages, are available.<sup>34</sup>

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24. See PAPPAS & QUICK, *supra* note 19, § 7, at B-1.

25. *Id.*

26. *Id.* at B-1, B-2 (discussing benefits and detriments of nondisclosure agreements versus non-compete agreements).

27. *Id.* at 2.

28. *Id.*

29. See PAPPAS & QUICK, *supra* note 19, § 7, at B-3.

30. *Id.*

31. *Id.*

32. See *id.* at 4 (even with the enactment of the UTSA, courts nevertheless heavily rely upon the relevant case law in interpreting statutory trade secret misappropriation claims) (internal citations omitted).

33. See *id.* at 9-10 (stating permanent injunctions are available only when remedies at law are inadequate or misappropriation is egregious; courts will also examine plaintiffs' conduct for any wrongdoing).

34. See *id.* at 4 (discussing that in appropriate circumstances, it is possible to recover compensatory damages in addition to injunctive relief).

Apart from civil actions, many states impose statutory criminal liability for trade secret misappropriation.<sup>35</sup> Under one type of criminal statute, divulgence of trade secrets that belong to state regulatory bodies is a misdemeanor.<sup>36</sup> Another type imposes criminal liability for private employees' divulgence of their employers' trade secrets.<sup>37</sup> Similarly, the Economic Espionage Act of 1996 imposes criminal liability for the theft or attempt thereof of trade secrets for the benefit of foreign entities.<sup>38</sup>

## **B. The Importance of Trade Secret Law<sup>39</sup>**

In the sophisticated market economy of the United States, where small businesses and large corporations compete for customers and profits, the possession of economically valuable trade secret information is paramount. When a business develops such information, it gains a competitive advantage in attracting more customers and increasing its revenues.<sup>40</sup> However, the development of such information is merely the first move in the game of marketplace competition. Companies must then keep information secret from their competitors' covetous gaze so they may deliver a distinct product or service to the market.<sup>41</sup>

Keeping such information secret is no easy task. Not only do companies need to develop effective business management strategies, but they must also have strong legal protection that renders their strategies effective. Absent adequate legal protection of valuable trade secret information, self-contained business strategies—no matter how effective—leave businesses vulnerable to information misappropriation. Most notably, vulnerability arises in situations that require businesses to invest in complex and expensive forms of protection that may depress businesses' revenues. Absent strong legal protection, businesses may also be exposed to vulnerability via the so-called threat of the Trojan horse. This threat is most obnoxious because it emerges from businesses' own employees. This occurs when an employee, who in the

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35. PAPPAS & QUICK, *supra* note 19, § 7, at C-1.

36. *Id.*

37. *Id.*

38. *Id.* § 7, at D-2 (citing 18 U.S.C. § 1831(a)).

39. See JAGER, *supra* note 5, § 1:1 (The importance of trade secret law has become more pronounced in recent years for three main reasons: (1) "the applicability and validity of other forms of legal protection for intellectual property in many of the emerging technologies have been fraught with uncertainty"; (2) "the technology is changing so rapidly that it is outstripping the existing laws intended to encourage and protect inventions and innovations"; and (3) "the relative ease of creating and controlling trade secret rights").

40. See Risch, *supra* note 2, at 7-8.

41. See UNIF. TRADE SECRETS ACT § 1(4)(ii) (1985); see also RESTATEMENT OF TORTS § 757 cmt. b (1939) (legal protection extends only to information that maintains its secrecy).

course of changing his or her employment to a competitor, unveils its former employer's secret business information. Thus, the need for well-defined rules of equitable business conduct is clear. These rules would serve as the essential ammunition in the competitive business battle.

### 1. The Economic Benefits of Trade Secret Law

The law of trade secrets offers such ammunition—a comprehensive and pliable legal framework.<sup>42</sup> A species of intellectual property law, trade secret law allows companies to keep their economically valuable business information indeterminately secret.<sup>43</sup> An important justification of trade secret law<sup>44</sup> is “the economic benefits that flow from [trade secrets’] existence, most notably incentives for businesses to spend less money protecting secret information or attempting to appropriate secret information.”<sup>45</sup> By providing legal protection for economically valuable secret business information, trade secret law incentivizes businesses to invest in areas such as market research and development.<sup>46</sup> Market research enables companies to gather information that facilitates the invention of higher quality and lower priced products and services.<sup>47</sup> As Professor Chiappetta observes:

[t]rade secrets increasingly constitute a central aspect of acquisitions and licensing programs, as well as a key component of business asset portfolios used for capital raising, joint research and development, and obtaining general competitive advantage. Businesses and their legal advisors clearly believe that trade secret law matters.<sup>48</sup>

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42. See Graves, *supra* note 3, at 47 (explaining that a property conception of trade secret law may help convince courts to interpret the law in a way that affords an adequate degree of legal protection to trade secret information).

43. See Risch, *supra* note 2, at 11; see also JAGER, *supra* note 5, § 1:16.

44. JAGER, *supra* note 5, § 1:18 (“The trilogy of public policies underlying trade secret laws are now: (1) the maintenance of commercial morality; (2) the encouragement of invention and innovation; and (3) the protection of the fundamental right of privacy of the trade secret owner.”) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 155–56 (1989)).

45. Risch, *supra* note 2, at 5; see also Chiappetta, *supra* note 6, at 69 (stating that one commentator argues that “two current trade secret justifications, incentive to invention and maintenance of commercial ethics, are embarrassingly inadequate” such that “[u]nless we fill [the trade secret law’s] normative gap, it is time to close up the trade secret shop.”) (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1973)).

46. See Chiappetta, *supra* note 6, at 86–87.

47. See *id.*

48. *Id.* at 71–72.

It matters because trade secret law stimulates business inventions that in turn contribute to the burgeoning of the economy, ultimately translating into an increased standard of living across the nation.<sup>49</sup> The need for trade secret law is so crucial to the U.S. economy that in 2013 the White House implemented a “Strategy to Mitigate the Theft of U.S. Trade Secrets” initiative.<sup>50</sup> The initiative has five key elements that focus on combatting external and internal threats of trade secret misappropriation.<sup>51</sup> Despite the increased focus on trade secret law, there remain the perennial concerns about trade secret law’s impact on restraints of trade.<sup>52</sup>

*a. The Concern that Trade Secret Law Restrains Trade is Unjustified*

While research and innovation are worthy justifications for trade secret law that confirm the need for strong legal protection of trade secrets, these justifications should be carefully balanced against the restraints of trade concern.<sup>53</sup> To elaborate, whereas the restraints of trade concern is buttressed by the desire to foster free market competition by encouraging uninhibited use of information and ideas in the public domain, the impetus that trade secret law provides to research and innovation springs from the recognition that businesses have proprietary rights in the ideas and information they develop.<sup>54</sup> Thus, the promotion of research and innovation as one of trade secret law’s justifications can be at loggerheads with the restraints of trade concern.<sup>55</sup> For example, when a company prohibits its employee from divulging secret business information that the employee became privy to in the course of employment, it discourages the employee from seeking better-suited employment from competitors.<sup>56</sup> However, if secret business information is understood as a property right, the restraints of trade concern becomes less pronounced because such understanding helps clearly establish the bounds of

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49. *See id.* at 86–87.

50. PAPPAS & QUICK, *supra* note 19, § 7, at A–2.

51. *Id.* (stating the five elements that comprise the White House initiative: (1) “diplomatic outreach”; (2) “promoting best practices in the private sector”; (3) “increased efforts by law enforcement”; (4) “legislative changes”; and (5) “increasing public awareness of the threat.”).

52. *See* JAGER, *supra* note 5, §§ 1:9–1:10.

53. *Id.*

54. *Id.*

55. *See id.*

56. *See* Madhavi Sunder, *Trade Secret and Human Freedom*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 334, 335 (Shyamkrishna Balganesh ed., 2013).



what is permissible employee behavior.<sup>57</sup> Understanding trade secrets as property discourages employers from seeking to improperly obtain trade secret information from new employees by clearly defining employer expectations.<sup>58</sup>

However, it may be observed that the proprietary view of trade secrets unfairly affords businesses greater leverage over their employees, thereby rendering the employer-employee relationship less propitious, especially when the employee may have invented or substantially contributed to the invention or research of a secret formula for a product or service.<sup>59</sup> In this context, the property view of trade secrets admittedly becomes much less supportable. It should be remembered, however, that the nature of things compels a certain degree of inequality in human relationships. The key to dealing with the natural inequality inherent in human relationships is to refrain from abusing it.<sup>60</sup> Some commentators recognize this natural inequality, tending to seek its resolution one-sidedly and in favor of employees. For example, as Professor Sunder said:

Although trade secret is a tool for incentivizing the production of valuable information and efficient disclosure, it is also more than that. Trade secret law regulates *social relations between employers and employees*. This is the law of nondisclosure agreements and implied duties on employees not to reveal working knowledge learned and developed on the job. In short, trade secret law implicates fundamental human freedoms, namely the freedom to move, to work, to compete, and to think.<sup>61</sup>

To Professor Sunder, the recognizable economic benefits of trade secret law should in no way undercut employees' freedom in making employment decisions. Sunder's view of trade secret law aligns with the contractarian legal philosophy that steers away from viewing secret business information as property, but rather towards excessively elevating the employer-employee relationship by contractual means.<sup>62</sup>

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57. See Risch, *supra* note 2, at 22–23 (citing *Vickery v. Welch*, 36 Mass. 523, 525 (1837)).

58. See *id.* at 28, 31.

59. See Sunder, *supra* note 56, at 348.

60. See JEAN-JACQUES ROUSSEAU, *ON THE ORIGIN AND FOUNDATION OF THE INEQUALITY OF MANKIND* (G.D.H. Cole trans., 1955) (1755).

61. Sunder, *supra* note 56, at 335, 342 (stating that proponents of the contractarian theory urge that the role of trade secret law is to regulate “relations between employers and employees.”).

62. *Id.* at 341–44 (citing KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* (1988) (exploring how Anglo-American legal milieu understands and governs secrets)).

Maintaining good employer-employee relationships is necessary for several reasons, including increasing a business's bottom-line to create more jobs. Trade secret law, however, does not aim at curtailing employee freedom in making employment decisions but rather polices theft of economically valuable business information.<sup>63</sup> More emphatically, trade secret law imposes liability only for improperly acquiring or using economically valuable secret business information and attaches no liability for gaining such information by legally proper means—independent discovery or reverse engineering.<sup>64</sup>

In other words, limiting an employee's freedom allows businesses to fairly compete in the market economy by developing trade secret information and delivering new products and services for profit.<sup>65</sup> When businesses develop secret information, they ordinarily invest substantial resources with the expectation of recouping them upon production and introduction of a service or product into the marketplace.<sup>66</sup> While these resources are not limited to financial ones and also include human talent, businesses expect that their employees work for the businesses' benefit. Despite employees' input into a given project, their professional mobility should not implicate their disclosure of secret business information that belongs to their former employer. Employees should avoid taking advantage of their former employers and should not feel compelled to disclose information. Professor Sunder suggests using employment contracts and nondisclosure agreements as a solution to resolve potential employee disclosure problems.<sup>67</sup> Such an inorganic, artificial, and purely legal solution would merely align trade secret law with the contractarian legal philosophy, without giving the potency of legal protection that trade secrets deserve and, frankly, require.<sup>68</sup>

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63. *See id.* at 336–37.

64. *Id.* at 337; *see also* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1973) (“[R]everse engineering . . . is . . . starting with the known product and working backward to divine the process which aided in its development or manufacture.”).

65. Chiappetta, *supra* note 6, at 71.

66. *See id.*

67. JAGER, *supra* note 5, §§ 1:9–1:11 (noting that American courts have long recognized that contracts to protect trade secrets fail to violate public policy against restraints of trade).

68. Chiappetta, *supra* note 6, at 74 (“[T]rade secrets are more than contract rights or duties of confidence; they deserve the same protection afforded any other substantial legally protected interest from government usurpation for public use. In remedial contexts, the policy objectives support applying ‘property rules’ remedies, such as injunctions, rather than ‘liability rules’ remedies like compensatory damages.”).

The contractarian solution may be necessary, but it is far from being sufficient.<sup>69</sup> After all, no company would delight in having the prospect of expending its funds—that are better suited for business development—to litigate the enforceability of its employees' contracts. Furthermore, the contractarian solution has a narrow focus, only offering legal protection from employee disclosures of trade secrets, while not protecting disclosure threats from those with whom a business has no connection or contractual privity.<sup>70</sup> Once economically valuable secret business information becomes accepted as a property right with potent legal remedies, employees would necessarily know their legal obligation to respect the intangible assets that belong to their employer. Employees would know the limits of what is permissible employee behavior.

Furthermore, recognition of the proprietary nature of trade secrets would give an unequivocal notice of legal boundaries to those with whom businesses have no privity. While to the contractarians, nondisclosure and nonsolicitation agreements offer optimal solutions to the legal protection of trade secrets, such solutions provide no legal protection to businesses from third-party misappropriation of trade secrets and may tip the balance of power in favor of employees. The contractarian commentators show concern that a strong legal protection of trade secrets may curtail employee freedom. As Professor Sunder explains, "There are deep connections between law, innovation, freedom, and democracy. Too strong trade secret law hampers the ability of employees to move, to work, to learn, to think, and to develop their own human capital."<sup>71</sup> However, affording strong legal protection to trade secrets fails to undermine employee freedom because it does not implicate "draconian limits on the mobility of employees" reminiscent of the medieval guild systems.<sup>72</sup> A stronger legal protection does, however, need to give a clear notice of businesses' proprietary rights in the information they develop. Accepting trade secrets as a form of property achieves a more balanced distribution of legal obligations between businesses, employees, and the public by inculcating the requisite respect for the ownership right through proper legal means.

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69. JAGER, *supra* note 5, § 1:13 (To illustrate the necessity of using contracts as vehicles that afford a legal protection to trade secrets: "The thousands of existing contracts sharing trade secrets have created beneficial economic activity, measuring in the billions of dollars, both within the United States and abroad.").

70. See Sunder, *supra* note 56, at 336–37, 341–44.

71. *Id.* at 350.

72. *Id.* at 343.

***b. Trade Secrets Should be Regarded as a Form of Property Right***

It is customary to think of property as necessarily implicating tangible attributes. The ordinary train of thought proceeds along clichéd tracks: if it can be touched, then it must be someone's property. Intangibles such as information, on the other hand, fail to inevitably evoke such associations. But intangible assets—particularly when someone invests their time and ideas to produce them—should be understood as property in the same or substantially similar sense as tangible assets. As Judge Easterbrook notes, “a right to exclude in intellectual property is no different in principle from the right to exclude in physical property.”<sup>73</sup> While Judge Easterbrook refers to property rights from the legal realists' perspective,<sup>74</sup> he displays an unerring sense that economically valuable secret information should be considered as property. However, when perceived from the legal realists' perspective, property rights represent a hazy notion of the bundle of rights as Wesley Hohfeld conceived it.<sup>75</sup>

**2. Legal Realism and Its Derogation of a Property Right**

Drawing upon Hohfeld's theory, legal realists “redefined property as a ‘bundle’ of rights with the government's grant of a right to exclude constituting the essential right that defines a legal entitlement as ‘property.’”<sup>76</sup> Legal realists rebuffed John Locke's seventeenth century natural rights theory of property.<sup>77</sup> The “realist mélange of nominalism, positivism, and pragmatism” gained momentum in the twentieth century because the realists' “reconceptualization of property . . . made it possible for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses.”<sup>78</sup> In other words,

73. Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 112 (1990).

74. Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 442 (1986) (quoting professor Golding, “Although realism was a movement of the 1920s and 30s, its first expression, . . . was Joseph W. Bingham's 1912 article ‘What Is the Law?’ in which the author expounded, powerfully and with precision, the underlying theory of a realist legal science.”).

75. Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2004 (2009); see generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

76. Mossoff, *supra* note 75, at 2004.

77. *Id.* at 2005–06.

78. *Id.* at 2007–08 (“After legal realism effected its revolution in American law in the early twentieth century, lawyers and judges conceived of property in the nominalist terms of ‘social relationships’ or ‘legal relations.’” *Id.* at 2010).

the legal realists diluted property rights by empowering the state to interfere with the exercise of these rights through greater government regulation.<sup>79</sup> The conceptual schism in the theory of property between Locke's natural law view and Hohfeld's legal realist view can be roughly understood in terms of earning the ownership right through one's merit and labor. Thus, whereas labor is antecedent to the ownership right in the natural law theory of property, to the legal realists "any value in something is merely a consequent of creating [the] legal entitlement" to exclude others.<sup>80</sup> While the natural law theory allows individuals to define their lives and happiness, the legal realists theory gives too much latitude to the government to define lives and happiness for individuals.

The legal realists theory derives its philosophical genesis from the legal positivism of the nineteenth century British jurist John Austin and the twentieth century British legal philosopher H. L. Hart. In his antiquarian concept of the law, Austin advances two key maxims. The first maxim, known as the separation thesis, rests on the idea that the law and morality should be segregated.<sup>81</sup> The second rests on the notion that "law is a command which obliges a person or persons," and proceeds "from *superiors*" to "bind and oblige *inferiors*."<sup>82</sup> These two maxims aim to show the separation between the laws of men and the laws of God so as to stress that society's laws should be based entirely upon man-made laws. Such separation is dangerous for several reasons. Most notably, it is dangerous because man-made laws have a greater potential to deviate from objectivity, consistency, and agreement if such laws are divorced from the higher divine law. The divorce between the two types of law is troubling because it freely admits the potential to abuse power, as no objective principle is bound to restrain men in making their laws.<sup>83</sup> Despite the potential for political abuse, however, this divorce fails to trouble Austin. "Of the laws or rules set by men to men," Austin insists, "some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or inde-

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79. *Id.* at 2005.

80. *Id.* at 2015.

81. JOHN AUSTIN & ROBERT CAMPBELL, LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW 16–18 (John Murray ed., 1885). The term separation thesis refers to the perennial debate between the natural law theorists and legal positivists about whether morality plays a role in the law. Briefly, while the natural law theorists think that morality and the law are inseparable, legal positivists and their theoretical progeny contend that the law and morality must be separated. *See id.*

82. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18 (John Murray ed., 1832).

83. *See* John Emerich Edward Dalberg, Lord Acton, Acton-Creighton Correspondence [1887], ONLINE LIBRARY OF LIBERTY, [http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524\\_label\\_010](http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010) ("Power tends to corrupt and absolute power corrupts absolutely.").

pendent political societies.”<sup>84</sup> In Austin’s universe—where the superiors stand outside the law and order the inferiors to do or refrain from doing one or another thing—there is no limit on the power and authority of the superiors in creating and interpreting the law. Thus, Austin’s view of human beings is dreadfully deficient because the so-called inferiors have no voice in the making of the law and exist as though to simply obey the superiors.<sup>85</sup> Reading Austin’s legal philosophy, one cannot help but have a nagging sense that humans have very little sense of moral obligation to self-govern by doing what is objectively good and just and to avoid committing evil.<sup>86</sup> Rather, Austin prefers to sidestep the moral dimension altogether. His entire philosophy rests on viewing the world from a political vantage point. He leaves no room for metaphysical reality that the natural law theorists have long recognized. Thus, Austin parts with the natural law theory, with the Western tradition, and with God.

While subscribing to the central notions of Austin’s legal positivism, Hart differs in several respects. First, unlike Austin, Hart believes that man-made laws can conform to the divine law. In holding such a belief, Hart more closely associates with the natural law theorists, although they conceive of law and morality as being necessarily intertwined. It must be noted, however, that Hart, like Austin, rejected the natural law theory’s idea that a human law that contradicted the divine law simply could not be law.<sup>87</sup> Second, Hart departed from Austin’s view that law is a command. He argued that:

[T]he command theory . . . seems breathtaking in its simplicity and quite inadequate. There is much, even in the simplest legal system, that is distorted if presented as a command. Yet the Utilitarians [like Austin and Jeremy Bentham] thought that the essence of a legal system could be conveyed if the notion of a command were supplemented by that of a habit of obedience. The simple scheme was this: What is a command? It is simply an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience. Commands are laws if two

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84. Austin, *supra* note 83, at 2.

85. THOMAS HOBBS, *LEVIATHAN* (1651) (explaining Austin’s view ineluctably evokes Thomas Hobbes’ dispiriting comment that life is “solitary, poor, nasty, brutish and short.”).

86. As RWM Dias aptly remarks, “The distinction between law and morals and between ‘having an obligation’ and ‘having a sense of obligation’ is important, but it is even more important that their relationship should not be left out of account. Law without a sense of obligation is *unworkable*, which means that any discussion of law as a functioning phenomenon has to include this moral dimension.” RWM DIAS, *JURISPRUDENCE* 49 (5th ed. 1985) (emphasis added).

87. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 596–97 (1958).

conditions are satisfied: first, they must be general; second, they must be commanded by what . . . exists in every political society whatever its constitutional form, namely, a person or a group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others. These persons are its sovereign. Thus law is the command of the uncommanded commanders of society—the creation of the legally untrammelled will of the sovereign who is by definition outside the law.<sup>88</sup>

Hart considered command theory of law anachronistic and ill-suited in a democracy like the U.S. He argued:

Austin, in the case of a democracy, looked past the legislators to the electorate as ‘the sovereign’ . . . He thought that in the United States the mass of the electors to the state and federal legislatures were the sovereign whose commands, given by their ‘agents’ in the legislatures, were law. But on this footing the whole notion of the sovereign outside the law being ‘habitually obeyed’ by the ‘bulk’ of the population must go: for in this case the ‘bulk’ obeys the bulk, that is, it obeys itself.<sup>89</sup>

The command theory of the law is unpersuasive to Hart for another reason. “[I]f laws are merely commands,” Hart astutely points out, “it is inexplicable that we should have come to speak of legal rights and powers as conferred or arising under them.”<sup>90</sup> In other words, conceived in terms of a command, law does not confer rights. Rather, law merely dictates through a sovereign who is above the law what the inferiors ought to do and abstain from doing.

The notion that there must be a sovereign who exists outside the law, commands what the law is, and expects unquestionable obedience is troubling. Uncurbed by any intelligible standard, the sovereign is arguably free to govern as the sovereign sees fit. Such a lowly state of affairs admits of no certainty or stability. Rather, it encourages governance by arbitrary power and fosters a concrete threat of political abuse. To curb the threat, there must be an objective standard that governs the entire society and applies equally to all societal echelons. To natural law theorists such as Hart, this standard must function as a limit on the choices people can make.<sup>91</sup> Hart, however, disagreed that the standard must necessarily be moral.<sup>92</sup> While to the natural law theorists the word “ought” connotes a moral standard, to Hart the word “merely reflects the presence of some standard of criticism; one of these

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88. *Id.* at 602–03.

89. *Id.* at 603–04.

90. *Id.* at 605.

91. *Id.* at 629.

92. *Id.* at 606, 629.

standards is a moral standard but not all standards are moral.”<sup>93</sup> Essentially, Hart feels at ease with the idea that there must be laws informed by principles other than morality as the natural law theorists conceived it.

### 3. The Natural Law Theory and the Elevation of Property Rights

The natural law theorists by and large associate morality with a rational order that derives from God.<sup>94</sup> Despite the permutations of opinions within the natural law tradition, the key concept of natural law theory is that “there are indeed some true and valid standards of right conduct.”<sup>95</sup> This key concept originated with the ancient Greek Stoic philosophers, continued with Cicero and Plato, and culminated with Saint Thomas Aquinas.<sup>96</sup> These theorists and other natural law theorists share one common idea, to wit:

natural law is unchanging over time and does not differ in different societies; every person has access to the standards of this higher law by use of reason; and . . . only just laws “really deserve [the] name” law, and “in the very definition of the term ‘law’ there inheres the idea and principle of choosing what is just and true.”<sup>97</sup>

In other words, law is “nothing else than an ordinance of reason for the common good, promulgated by him [divine being] who has the care of the community.”<sup>98</sup> It is a flattering view of human beings to maintain that they are capable of accessing the higher or divine law through the use of their reason.<sup>99</sup> More than that, the idea that human beings structure their society and laws in accord with a rational order that imitates the divine order and thus

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93. H.L.A. Hart, *supra* note 87, at 613.

94. See generally DIAS, *supra* note 86, at 472.

95. THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 3 (Jules Coleman & Scott Shapiro, eds. 2002).

96. BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 68–69 (6th ed. 2012). As Saint Thomas Aquinas articulated it, the medieval concept of the natural law theory possessed an inherently teleological nature. *Id.* at 73. Later, however, Hugo Grotius secularized the natural law theory by stressing the role of individual rights serving as the natural constraints on the government power. Grotius “opened the path for the later liberal natural rights” theorists such as John Locke.

97. *Id.* at 68.

98. ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 995 (Fathers of the English Dominican Province trans., 1981) (1948). To put it bluntly, “[t]he natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally.” *Id.*

99. *Id.*



has clearly defined limits permits of a certainty and stability in which human beings have certain rights as well as duties.

Unlike legal positivists and legal realists, the natural law jurists conceive of human beings as having a larger role in the development of law and society. Consistent with that role is the idea that human beings ought to have concrete legal rights such as property rights that deserve requisite recognition and protection. As Locke reasoned:

I will not content myself to answer that if it be difficult to make out property upon a supposition that God gave the world to Adam and his posterity in common, it is impossible that any man but one universal monarch should have any property upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of all the rest of his posterity. But I shall endeavor to show how men might come to have a property in several parts of that which God gave to mankind in common.<sup>100</sup>

Thus, according to Locke, any human being has the potential to acquire property. “Though the earth and all inferior creatures be common to all men,” Locke explained the following:

[Y]et every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands, . . . are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.<sup>101</sup>

Locke’s theory of property rests on a meritocratic premise. So long as one is willing to invest one’s labor and time to, for example, cultivate a piece of land, one could acquire a property right in that land. Pursuant to Locke’s theory, American law previously defined property as “the exclusive right of possessing, enjoying, and disposing of a thing.”<sup>102</sup> This definition and Locke’s theory, of course, refer to the physical aspects of the property right.

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100. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 133–34 (Thomas I. Cook ed., 1947) (1690).

101. *Id.* at 134.

102. *See, e.g.,* *McKeon v. Bisbee*, 9 Cal. 137, 142 (1858) (Burnett, J., concurring). As Professor Mossoff observed, “jurists in the nineteenth century often employed Lockean property theory to define the meaning of property within American law.” Mossoff, *supra* note 15, at 2021.

However, Locke's conceptual framework can by analogy apply to the intangible aspects of the property right.

In the case of trade secrets, for example, companies invest time and labor in developing economically valuable information that enables them to innovate products or services to the exclusion of other companies because the latter lack the particular information needed to develop a given product or service. Time and labor are thus distinguishing characteristics in the process of creating a property right in a tangible as well as an intangible asset. As Judge Easterbrook aptly noted, "we should treat intellectual and physical property identically in the law."<sup>103</sup> It should not matter that the time and labor are spent on creating a tangible or an intangible asset. But what should matter is that individuals and companies have the freedom to create, develop, and innovate better products and services without the concern that the government may arbitrarily trample upon or in some way abrogate this freedom based upon the notion that if it has the power to grant property rights, then it can claim that right for return. What also should matter is that individuals and companies have a clearly recognized property right in what they create, develop, and innovate.

#### **4. The Two Analytical Modes of Trade Secret Law: Property and Relational Theories**

The notion that a company possesses a property right in its economically valuable secret business information is far from being novel. On the contrary, it is quite orthodox in the American jurisprudence of trade secret law.<sup>104</sup> To illustrate, at the emergence of trade secret law in the U.S. in the nineteenth century, American courts unquestionably treated trade secrets as a form of property. The first reported case interpreting a trade secret as a property right was *Vickery*.<sup>105</sup> In *Vickery*, the plaintiff contracted with the defendant to buy the latter's chocolate-mills, "together with his exclusive right and art or secret manner of making chocolate."<sup>106</sup> However, defendant denied that he agreed to refrain from divulging the secret art of making chocolate, arguing that in his real estate deed to plaintiff he solely conveyed tangible assets

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103. Easterbrook, *supra* note 73, at 118.

104. "Trade secret law," Professor Bone explains, "took shape in the late nineteenth century, and its doctrinal structure developed in response to formalistic conceptions of possession and ownership that were popular at the time." Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 245 (1998). Interestingly, in his article Professor Bone states that because trade secret law is comprised of various bodies of law such as tort and contracts, it therefore should be eliminated as an independent basis of legal protection. *Id.*

105. *See generally* *Vickery v. Welch*, 36 Mass. (1 Pick.) 523 (1837).

106. *Id.* at 523.

associated with the sale of the chocolate factory.<sup>107</sup> The court disagreed with defendant and held in plaintiff's favor, in reasoning the following:

The plaintiff was to become the proprietor of the mills, and also of the secret mode of manufacture which the bond supposes was used and possessed by the defendant. The defendant was to sell, the plaintiff was to buy. Now we cannot perceive the least reason which, after such sale, would enable the defendant lawfully to retain any right in the property or rights sold, nor any right to convey to strangers, any part of what was to be transferred to the plaintiff. *The exclusive right was to be transferred to plaintiff, and we cannot conceive that it would be exclusive, if the defendant might, after such sale, admit as many persons to participate as would pay for, or receive gratuitously, the same privilege which the defendant had granted or stipulated to grant.*<sup>108</sup>

The *Vickery* court's reference to the defendant's conveyance of the "exclusive right" in manufacturing chocolate unmistakably alludes to the conveyance of a property right. Absent this "exclusive right," the plaintiff's purchase of the defendant's business would contradict basic business sense because it is precisely the exclusivity of knowing the chocolate manufacturing process that would enable plaintiff to successfully compete in the chocolate making business.

The court in *Peabody v. Norfolk* came to the same conclusion as the *Vickery* court by treating economically valuable business information as a form of property.<sup>109</sup> The *Peabody* court, however, explicitly referred to trade secrets as property. "If a man establishes a business," the court observed, "and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property."<sup>110</sup> In analyzing the court's prose,

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107. *Id.* at 524. The defendant's deed read that defendant conveys his "exclusive right and arts or secret manner of manufacturing chocolate; hereby declaring, however, that I have no patent or other exclusive right or arts except what I have gained by my skill and experience . . . ; and I never have, and do not hereby even impliedly covenant not to communicate the results of my experience to others." *Id.* Read alone, this statement could have been interpreted to mean that defendant failed to understand that he had a property right in his chocolate manufacturing process. *Id.* However, other facts of the case indicate that defendant was well aware of possessing the property right because, while vehemently rejecting plaintiff's request to refrain from divulging the secret manufacturing process, defendant "had exacted an oath or a bond" of several people "not to divulge" his secret manner of making chocolate "while he should continue in manufacture." *Id.*

108. *Id.* at 526 (emphasis added).

109. *See generally* *Peabody v. Norfolk*, 98 Mass. 452 (1868).

110. *Id.* at 457.

it becomes apparent that such language is imbued with Locke's conception of a property right. The court elaborated,

If he invents or discovers, and keeps secret, a process of manufacture . . . a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; *but he has a property in it*, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons.<sup>111</sup>

The view of trade secrets as property predominated in the U.S. until about 1917.

Around 1917, legal realism began to take hold on the minds of prominent American jurists as Oliver Wendell Holmes, Jr., thus diluting the concept of a property right and thereby redefining American trade secret law as the relationship between trade secret owners and trade secret thieves.<sup>112</sup> The trade secret law's redefinition is best captured in *E.I. DuPont de Nemours Powder Co. v. Masland*, in which Justice Holmes reasoned the following:

The word 'property' as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. *Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs.*<sup>113</sup>

The *Masland* Court was all too eager to recognize the legal realist concept of the confidential relationship between defendant and plaintiff, even in

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111. *Id.* at 458 (emphasis added).

112. Perhaps the best encapsulation of legal realism comes in this famous quote by Holmes: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). This quote touches upon the chasm between the natural law theory and legal realism. While Holmes and other legal realists crown experience as the determinant of law making, the natural law theorists underscore human reason and logic in the law making process.

113. *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (emphasis added).

derogation of recognizing a property right in economically valuable secret business information. As a consequence of legal realism's entry into the landscape of American jurisprudence, courts can now apply two alternative methods of analysis to the adjudication of trade secret cases, effectively adding a layer of unnecessary confusion to an already complicated body of law.<sup>114</sup> While one mode of analysis is rooted in Locke's notion of property law, the other sprouts from the relational rhetoric of legal realism. These two methods of analysis, produce widely different outcomes in trade secret cases.<sup>115</sup>

Specifically, trade secret analysis based upon the relational concept "emphasizes not the boundaries of the information at issue but the asserted disloyalty of the employee, who is alleged to have owed a one-way duty of fidelity to the employer."<sup>116</sup> Thus, employee liability accrues not from purloining the employer's economically valuable information but from the employee's abuse of trust, or abuse of the confidential relationship with the employer.<sup>117</sup> Such a mode of analysis is diametrically opposed to the property concept of trade secrets. Under the property view, a court's initial inquiry begins not in ascertaining whether an employee breached the employer's trust or fiduciary relationship but on whether the allegedly secret information is protectable in the first place.<sup>118</sup> Whether the information is protectable yields a more objective mode of analysis not because it helps define the limits of secret business information but because it protects against third party misappropriations. The relational analysis, however, fails to account for third party misappropriations of trade secrets because there is no privity or any conceivable fiduciary nexus between a business and a third party that purloins the business's economically valuable information. Absent such a privity or fiduciary nexus, it is nearly impossible to impose liability upon third parties for stealing economically valuable business information from its business competitors. Under such an arrangement, no business would expend its own financial resources to innovate products or services

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114. "Courts tend to issue different trade secret rulings depending on whether they follow a property rights approach or an employer-centric, relational approach." Graves, *supra* note 3, at 42.

115. Noteworthy, the relational concept failed to raze the traditional notion of trade secrets as a form of property right. For instance, in *Ruckelshaus v. Monsanto*, the U.S. Supreme Court explicitly stated that trade secrets are a form of property as Locke conceived of it. *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). "This general perception of trade secrets as property," the Court explained, "is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'" *Id.* at 1002-03.

116. Graves, *supra* note 3, at 42.

117. *Id.* at 49.

118. *See id.*

that fail to qualify for patent protection.<sup>119</sup> Absent trade secret law that is capable of giving a potent remedy against third party misappropriations, the marketplace would exist in an ethical vacuity that rewards individuals for outsmarting competitors at any price. Thus, the relational mode of analysis fails to account for two major policies that justify trade secret law. The mode of analysis fails to explain trade secret law's encouragement of economic development and innovation, and it is oblivious to the need of fostering commercial ethics and fair competition in the marketplace.

### **5. Trade Secret Law Promotes Ethical Business Conduct and Fair Competition**

Viewing trade secrets as a form of property fosters commercial ethics, or fair play, in the marketplace because the notion of property necessarily conveys a strong sense that what belongs to a certain individual or business demands a greater respect for the limits that the ownership right intimates.<sup>120</sup> In other words, fair play helps define what is permissible business conduct and what is proper competition. It is partially due to the presence of fair play that trade secret law permits reverse engineering and independent discovery.<sup>121</sup> Business competitors know that they can develop certain secret business information by fair and honest means. In turn, knowing what permissible business conduct and proper competition are in the marketplace is vital to fostering efficiency and allowing parties who stand in confidential

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119. Some might argue that patent law can protect against third party theft of information. Patent law, however, is not an attractive option in this case because it requires disclosure of information before it can render its protection. Patent law and trade secret law serve different goals, which is partially why the Supreme Court held that both bodies of law co-exist. Specifically, to claim protection under trade secret law, the need for the information to remain secret is imperative. Secrecy, however, is not a requirement in claiming protection under patent law. Quite the contrary, in receiving patent law's protection, the patentee is compelled to publicly disclose the patented invention. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475, 481 (1974).

120. In *Kewanee*, the Supreme Court referred to trade secret law's policy of commercial ethics as standard that helps reinforce the import of good faith and fair dealing in commercial transactions. *Id.* at 481–82.

121. Independent discovery and reverse engineering represent defenses to trade secret misappropriation claim. However, to succeed in reverse engineering defense, a business must show that it meticulously documented its steps in developing the information and its substantial efforts resulted not merely in unveiling of a trade secret, but also in a creation of a unique product or service. It is important to note that while reverse engineering may be an effective defense to a trade secret allegation, it still remains vulnerable to patent infringement claims. ROBERT C. DORR & CHRISTOPHER H. MUNCH, *PROTECTING TRADE SECRETS, PATENTS, COPYRIGHTS, AND TRADEMARKS* (3d ed. 2003).

relationships to freely share secret business information.<sup>122</sup> Absent knowledge of what is permissible business conduct, "the protection of intellectual property would not exist. . . . The pirating of commercially valuable ideas would be commonplace. Fear and suspicion would permeate every transaction. Any idea of value could be bought or sold from even the most trusted employees."<sup>123</sup> Thus, "[t]he legal protection of trade secrets stabilizes the relationship of people in commercial transactions by providing rules of fair play which govern even in the absence of an express contract."<sup>124</sup> In turn, more stable business relationships allow businesses to expend significantly less money on trying to maintain the secrecy of their economically valuable trade information.<sup>125</sup>

One corollary of more stable business relationships is the lower production costs that enable businesses to sell their products and services at a price accessible to a wider market.<sup>126</sup> Further, another corollary is that stable business relationships stimulate businesses' incentive to innovate because they are more willing to invest large sums of money into the development of new products or services when they can expect fair competition. More importantly, more stable business relationships boost the economy, expand the job market, and improve the overall quality of life across societal echelons.

However, the stability of business relationships depends upon an organic development that begins with conceiving trade secrets as property. The property concept facilitates an understanding that a trade secret belongs to a business by stressing that a non-owner of the trade secret cannot overstep without suffering serious ramifications. No other legal views can comprehensively convey this strong sense of limits. Neither contractual nor another relational theory standing alone can impart this strong sense of clearly defined limits in obtaining the competitor's trade secrets. The relational theories merely pertain to the enforcement of limits in the employer-employee context whereas the property theory draws those limits in a third party context as well.

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122. PAPPAS & QUICK, *supra* note 19, § 7 at A-1.

123. JAGER, *supra* note 5, at § 1:3.

124. *Id.* In his treatise on trade secret law, Jager notes that various societies recognized the importance of commercial morality and protection of trade secrets. *Id.* For instance, in ancient Rome the *actio servi corrupti*, or the action for corrupting a slave, resembled trade secret misappropriation cause of action and leveled the double measure of actual damages against the third party who egged on the slave to divulge trade secrets. *Id.* The double measure of actual damages served to deter future instances of trade secret theft. *Id.*

125. Risch, *supra* note 2, at 5. "[T]he primary benefit of trade secret law," Professor Risch observes, "is the decrease in both the amount spent on protecting secrets and the amount spent by those who seek to learn them." *Id.* at 26.

126. *Id.* at 27-28.

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### III. CONCLUSION

While some critics find trade secret law to be a befuddling bundle of legal concepts that lack an independent legal basis and instead draw upon such ingrained legal principles as torts and contract,<sup>127</sup> the proponents of trade secret law readily discern a great benefit that trade secret law affords to businesses in the economy.<sup>128</sup> The proponents maintain that the lack of trade secret law's independent legal basis should not militate against its existence. On the contrary, trade secret law's powerful incentive to innovation, stabilization of business relationships, and economic stimulation should put all doubts about trade secret law's existence beyond question. Instead, the focus of inquiry on trade secret law should be on the potency of its legal remedy against trade secret misappropriations by employees and third party competitors.

Neither contract nor tort law by itself can afford an adequate deterrent against trade secret misappropriations because these bodies of law merely serve as enforcement devices that nonetheless represent an essential supplement to trade secret law. Despite their intangible nature, trade secrets need to be recognized as property, à la Locke, for at least two reasons. First, recognizing trade secrets as property instills a strong sense of limits inherent in the concept of ownership. Second, the concept of ownership rests on the universally recognized principle of acquiring any type of asset through investing time and labor in the development of a given product, service, or method. Only when trade secrets are widely recognized to be property can there be clear expectations of business and employee behavior, creating respect for the assets that belong to another.

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127. See generally Bone, *supra* note 104.

128. See generally Chiappetta, *supra* note 6.





## Comments

